

Suspend the Rules and Pass the Bill, H.R. 935, With an Amendment

(The amendment strikes all after the enacting clause and inserts a new text)

117TH CONGRESS
2^D SESSION

H. R. 935

To amend the Securities Exchange Act of 1934 to exempt from registration brokers performing services in connection with the transfer of ownership of smaller privately held companies.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 8, 2021

Mr. HUIZENGA (for himself, Mr. HIGGINS of New York, Mr. POSEY, and Mrs. CAROLYN B. MALONEY of New York) introduced the following bill; which was referred to the Committee on Financial Services

A BILL

To amend the Securities Exchange Act of 1934 to exempt from registration brokers performing services in connection with the transfer of ownership of smaller privately held companies.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Small Business Merg-
5 ers, Acquisitions, Sales, and Brokerage Simplification Act
6 of 2021”.

1 **SEC. 2. REGISTRATION EXEMPTION FOR MERGER AND AC-**
2 **QUISITION BROKERS.**

3 Section 15(b) of the Securities Exchange Act of 1934
4 (15 U.S.C. 78o(b)) is amended by adding at the end the
5 following:

6 “(13) REGISTRATION EXEMPTION FOR MERGER
7 AND ACQUISITION BROKERS.—

8 “(A) IN GENERAL.—Except as provided in
9 subparagraph (B), an M&A broker shall be ex-
10 empt from registration under this section.

11 “(B) EXCLUDED ACTIVITIES.—An M&A
12 broker is not exempt from registration under
13 this paragraph if such broker does any of the
14 following:

15 “(i) Directly or indirectly, in connec-
16 tion with the transfer of ownership of an
17 eligible privately held company, receives,
18 holds, transmits, or has custody of the
19 funds or securities to be exchanged by the
20 parties to the transaction.

21 “(ii) Engages on behalf of an issuer in
22 a public offering of any class of securities
23 that is registered, or is required to be reg-
24 istered, with the Commission under section
25 12 or with respect to which the issuer files,
26 or is required to file, period information,

1 documents, and reports under subsection
2 (d).

3 “(iii) Engages on behalf of any party
4 in a transaction involving a shell company,
5 other than a business combination related
6 shell company.

7 “(iv) Directly, or indirectly through
8 any of its affiliates, provides financing re-
9 lated to the transfer of ownership of an eli-
10 gible privately held company.

11 “(v) Assists any party to obtain fi-
12 nancing from an unaffiliated third party
13 without—

14 “(I) complying with all other ap-
15 plicable laws in connection with such
16 assistance, including, if applicable,
17 Regulation T (12 C.F.R. 220 et seq.);
18 and

19 “(II) disclosing any compensation
20 in writing to the party.

21 “(vi) Represents both the buyer and
22 the seller in the same transaction without
23 providing clear written disclosure as to the
24 parties the broker represents and obtaining

1 written consent from both parties to the
2 joint representation.

3 “(vii) Facilitates a transaction with a
4 group of buyers formed with the assistance
5 of the M&A broker to acquire the eligible
6 privately held company.

7 “(viii) Engages in a transaction in-
8 volving the transfer of ownership of an eli-
9 gible privately held company to a passive
10 buyer or group of passive buyers.

11 “(ix) Binds a party to a transfer of
12 ownership of an eligible privately held com-
13 pany.

14 “(C) DISQUALIFICATION.—An M&A broker
15 is not exempt from registration under this para-
16 graph if such broker (and if and as applicable,
17 including any officer, director, member, man-
18 ager, partner, or employee of such broker)—

19 “(i) has been barred from association
20 with a broker or dealer by the Commission,
21 any State, or any self-regulatory organiza-
22 tion; or

23 “(ii) is suspended from association
24 with a broker or dealer

1 “(D) RULE OF CONSTRUCTION.—Nothing
2 in this paragraph shall be construed to limit
3 any other authority of the Commission to ex-
4 empt any person, or any class of persons, from
5 any provision of this title, or from any provision
6 of any rule or regulation thereunder.

7 “(E) DEFINITIONS.—In this paragraph:

8 “(i) BUSINESS COMBINATION RE-
9 LATED SHELL COMPANY.—The term ‘busi-
10 ness combination related shell company’
11 means a shell company that is formed by
12 an entity that is not a shell company—

13 “(I) solely for the purpose of
14 changing the corporate domicile of
15 that entity solely within the United
16 States; or

17 “(II) solely for the purpose of
18 completing a business combination
19 transaction (as defined under section
20 230.165(f) of title 17, Code of Fed-
21 eral Regulations) among one or more
22 entities other than the company itself,
23 none of which is a shell company.

24 “(ii) CONTROL.—The term ‘control’
25 means the power, directly or indirectly, to

1 direct the management or policies of a
2 company, whether through ownership of
3 securities, by contract, or otherwise. There
4 is a presumption of control if, upon com-
5 pletion of a transaction, the buyer or group
6 of buyers—

7 “(I) has the right to vote 25 per-
8 cent or more of a class of voting secu-
9 rities or the power to sell or direct the
10 sale of 25 percent or more of a class
11 of voting securities; or

12 “(II) in the case of a partnership
13 or limited liability company, has the
14 right to receive upon dissolution, or
15 has contributed, 25 percent or more
16 of the capital.

17 “(iii) ELIGIBLE PRIVATELY HELD
18 COMPANY.—The term ‘eligible privately
19 held company’ means a privately held com-
20 pany that meets both of the following con-
21 ditions:

22 “(I) The company does not have
23 any class of securities registered, or
24 required to be registered, with the
25 Commission under section 12 or with

1 respect to which the company files, or
2 is required to file, periodic informa-
3 tion, documents, and reports under
4 subsection (d).

5 “(II) In the fiscal year ending
6 immediately before the fiscal year in
7 which the services of the M&A broker
8 are initially engaged with respect to
9 the securities transaction, the com-
10 pany meets either or both of the fol-
11 lowing conditions (determined in ac-
12 cordance with the historical financial
13 accounting records of the company):

14 “(aa) The earnings of the
15 company before interest, taxes,
16 depreciation, and amortization
17 are less than \$25,000,000.

18 “(bb) The gross revenues of
19 the company are less than
20 \$250,000,000.

21 For purposes of this subclause, the
22 Commission may by rule modify the
23 dollar figures if the Commission deter-
24 mines that such a modification is nec-
25 essary or appropriate in the public in-

1 interest or for the protection of inves-
2 tors.

3 “(iv) M&A BROKER.—The term ‘M&A
4 broker’ means a broker, and any person
5 associated with a broker, engaged in the
6 business of effecting securities transactions
7 solely in connection with the transfer of
8 ownership of an eligible privately held com-
9 pany, regardless of whether the broker acts
10 on behalf of a seller or buyer, through the
11 purchase, sale, exchange, issuance, repur-
12 chase, or redemption of, or a business com-
13 bination involving, securities or assets of
14 the eligible privately held company, if the
15 broker reasonably believes that—

16 “(I) upon consummation of the
17 transaction, any person acquiring se-
18 curities or assets of the eligible pri-
19 vately held company, acting alone or
20 in concert—

21 “(aa) will control the eligible
22 privately held company or the
23 business conducted with the as-
24 sets of the eligible privately held
25 company; and

1 “(bb) directly or indirectly,
2 will be active in the management
3 of the eligible privately held com-
4 pany or the business conducted
5 with the assets of the eligible pri-
6 vately held company, including
7 without limitation, for example,
8 by—

9 “(AA) electing execu-
10 tive officers;

11 “(BB) approving the
12 annual budget;

13 “(CC) serving as an ex-
14 ecutive or other executive
15 manager; or

16 “(DD) carrying out
17 such other activities as the
18 Commission may, by rule,
19 determine to be in the public
20 interest; and

21 “(II) if any person is offered se-
22 curities in exchange for securities or
23 assets of the eligible privately held
24 company, such person will, prior to
25 becoming legally bound to consum-

1 mate the transaction, receive or have
2 reasonable access to the most recent
3 fiscal year-end financial statements of
4 the issuer of the securities as custom-
5 arily prepared by the management of
6 the issuer in the normal course of op-
7 erations and, if the financial state-
8 ments of the issuer are audited, re-
9 viewed, or compiled, any related state-
10 ment by the independent accountant,
11 a balance sheet dated not more than
12 120 days before the date of the offer,
13 and information pertaining to the
14 management, business, results of op-
15 erations for the period covered by the
16 foregoing financial statements, and
17 material loss contingencies of the
18 issuer.

19 “(v) SHELL COMPANY.—The term
20 ‘shell company’ means a company that at
21 the time of a transaction with an eligible
22 privately held company—

23 “(I) has no or nominal oper-
24 ations; and

25 “(II) has—

- 1 “(aa) no or nominal assets;
- 2 “(bb) assets consisting solely
- 3 of cash and cash equivalents; or
- 4 “(cc) assets consisting of
- 5 any amount of cash and cash
- 6 equivalents and nominal other as-
- 7 sets.

8 “(F) INFLATION ADJUSTMENT.—

9 “(i) IN GENERAL.—On the date that

10 is 5 years after the date of the enactment

11 of this paragraph, and every 5 years there-

12 after, each dollar amount in subparagraph

13 (E)(iii)(II) shall be adjusted by—

14 “(I) dividing the annual value of

15 the Employment Cost Index For

16 Wages and Salaries, Private Industry

17 Workers (or any successor index), as

18 published by the Bureau of Labor

19 Statistics, for the calendar year pre-

20 ceding the calendar year in which the

21 adjustment is being made by the an-

22 nual value of such index (or suc-

23 cessor) for the calendar year ending

24 December 31, 2020; and

1 “(II) multiplying such dollar
2 amount by the quotient obtained
3 under subclause (I).

4 “(ii) ROUNDING.—Each dollar
5 amount determined under clause (i) shall
6 be rounded to the nearest multiple of
7 \$100,000.”.

8 **SEC. 3. EFFECTIVE DATE.**

9 This Act and any amendment made by this Act shall
10 take effect on the date that is 90 days after the date of
11 the enactment of this Act.